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No. 763

WABASH RAILROAD COMPANY, a Corporation,

Petitioner,

vs.

E. F. WILLIAMSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 763

WABASH RAILROAD COMPANY, A CORPORATION,
Petitioner,

vs.

J. F. WILLIAMSON,
Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Wabash Railroad Company, a corporation, respectfully petitions for a writ of certiorari to review a final judgment and decision of the Supreme Court of Missouri, the highest court of that state, affirming a judgment for $17,500.00 in favor of respondent and against petitioner, entered in the Circuit Court of Jackson County, Missouri, in an action brought against it by respondent under the Federal Employers' Liability Act as amended August 11, 1939 (45 U. S. C. A. Sec. 51 *et seq.*), 53 Stat. 1404, J. F. Williamson, respondent, *v.* Wabash Railroad Company, appellant, 196 S. W. (2d) 129 (not yet officially reported). Said judgment and decision of the Supreme Court of Mis-

souri became final September 9, 1946, and petitioner has exhausted its remedies in the courts of Missouri.

I

Summary and Short Statement of Matters Involved

(The quoted portions of this statement are from the opinion of the Supreme Court of Missouri, R. 169.)

This action involves the application of the "primary duty rule," the contention of petitioner being that respondent had a positive and primary duty which he failed to perform, resulting in a head-on collision in which he was injured, which failure barred his right to recover, even though others had the same duty, which they failed to perform.

"This is an action under the Federal Employers' Liability Act, filed in the Circuit Court of Jackson County, Missouri. Respondent, J. F. Williamson, obtained a judgment for $17,500 for injuries received by him on account of a collision of two trains operated by appellant, Wabash Railroad Company. From this judgment appellant has duly appealed.

"Appellant's first assignment of error is that the court should have sustained its motion for a directed verdict at the close of all of the evidence.

"The record shows that on April 11, 1944, the crew of appellant's freight train No. 92 consisted of the engineer J. M. Meek, the fireman Ewing, the conductor Carson Adams, the rear brakeman John Hawkins, and the head brakeman, Respondent Williamson. This crew took charge of the train at Stanberry, Missouri, and there they checked their watches. Before the train left Stanberry the crew was given a train order to the effect that passenger train No. 11 would wait at Gallatin until 2:15 A. M. for train No. 92, and that No. 92 should stop at Jameson if it could not reach

Gallatin in time to clear No. 11 by 2:10 A. M., or five minutes before No. 11 was due to leave Gallatin.

"Respondent was sitting on the left side of the engine in the brakeman's seat, which is ahead of the fireman's seat, looking ahead. There are three curves between Jameson and Gallatin at which the speed had to be reduced to 35 miles an hour. When No. 92 got to Jameson respondent looked at his watch and it was 2:05 A. M. As the engineer did not slow down there respondent said to him, 'John, we can't make it.' The engineer replied, 'I've got plenty of time.' Respondent testified that he knew they could not cover the 6.7 miles to Gallatin in time to clear No. 11 by 2:10 as required by the train order. After the above statements between the engineer and respondent nothing further was said between them until respondent called, 'Headlight.' The engineer leaned out of the window to see around the curve and at the same time applied the emergency brake. The other train was then about 100 yards away. When respondent saw the headlight the freight train was on straight track, looking across the inside curve, and No. 11 was on the other side of the curve. The fireman, respondent and the engineer jumped off the engine on the fireman's side. At the time of the collision No. 92 had reduced its speed to about 10 miles an hour and No. 11 had practically stopped. The engineer of No. 11 first saw No. 92 when it was about 700 feet away."

The plaintiff introduced in evidence Wabash rules numbered 863, 865, 99, 106, and 835 (R. 16-17). These rules are quite similar and, in general, provide that the engineer and conductor are responsible for the movement, safety, and proper care of trains.

Petitioner (appellant) admitted that the engineer and conductor of No. 92 were negligent, but contended that respondent violated a positive and independent duty im-

posed on him by the train order and petitioner's Rule 738, which is as follows:

> "'Conductors, trainmen, yardmen, signalmen, operators and others whose duties are connected with the movement of trains, engines or cars, must familiarize themselves with the rules governing the duties of others as well as of themselves and must be prepared, in case of emergency, to act in any capacity to insure safety. The designation "conductors" and "trainmen" in any rule will also include yardmen, when applicable. While general regulations are subdivided for convenience they apply equally to all and must be observed wherever they relate in any way to the proper discharge of the duties of any employe. Trainmen, firemen and yardmen must remind their conductors or engine foremen, and enginemen of the contents of train orders, or the time of superior trains which must be cleared, should there be occasion to do so.'
>
> "Both appellant's and defendant's witnesses testified that at Jameson respondent said to the engineer, 'John, we can't make it.' Respondent contends that he complied with Rule 738 when he made that statement, that he thereby reminded the engineer of the contents of the train order."

In discussing Rule 738, Mr. L. A. High, superintendent of the Moberly division of the Wabash, testified that he had charge of the operation and maintenance of the railroad west of the Mississippi, except the terminals in St. Louis and Kansas City, and of the men who operate the trains; that he is familiar with the rules and with the duties of the men operating the trains; that the duties of a head brakeman are to keep a lookout, to understand train orders, to know what train orders the train has, to know it is moving properly under its orders and that it has a right to move, to protest if orders are violated, to such an extent that necessary action is taken to comply with orders, and to take necessary action to protect the train from accidents and

employees from injury (R. 82-84). In interpreting Rule 738 as to what is an emergency, Mr. High testified to what everybody knows—that if a train is running toward a station and can't make it in time to clear the time of another train, that would be an emergency (R. 85); that a potential head-on collision is an emergency (R. 92); and that as soon as No. 92 passed Jameson and didn't have time to get to Gallatin by 2:10, there was an emergency (R. 94). As to the duty of the head brakeman when such an emergency arose, High testified (R. 85-87) that it was Williamson's duty to have gone over to the engineer and got him to stop the train, and if he couldn't persuade the engineer, he should have set the air, if that was necessary to make the train stop (R. 87). The air valve to stop the train was at the left of the engineer and about five feet from the fireman's side of the cab (R. 64-5), where Williamson was sitting.

In affirming the judgment, the Supreme Court of Missouri held that respondent had complied with Wabash Rule 738 and further, that the emergency contemplated by that rule, requiring action by respondent, was one which arose *only* when a superior employee is *incapacitated* due to sickness, death, or other reasons. In so holding, the court concluded that the "primary duty rule" was not involved, that respondent was not guilty of negligence as a matter of law, and that respondent was entitled to a directed verdict in his favor, without submitting the issue of proximate cause.

It is the contention of petitioner that its motion for a directed verdict (R. 129) should have been given, for the reason that Rule 738 placed a positive and independent duty on respondent to act in emergency in any capacity to insure safety, that an emergency existed, that he failed to act, resulting in his injury, and that, therefore, under the

decisions of this Court, he cannot recover, even though others may also have been negligent in violating the train order and the rule. If the Court does not agree with that contention, it is then the contention of petitioner that petitioner's instruction "A" (R. 133), requiring the jury to find that respondent was guilty of contributory negligence as a matter of law, should have been given, and that the respondent's instruction "1" (R. 129-30), directing a verdict in his favor, should have been refused, because the question of proximate cause of respondent's and petitioner's negligence should have been submitted to the jury.

II

Statement as to Jurisdiction

The jurisdiction of the Court is invoked under Sec. 237 of the Judicial Code as amended by Act of February 13, 1925, Chap. 229, Sec. 1, 43 Statutes 937, U. S. C. A. Title 28, Sections 344(a) and 344(b), to review a final judgment of the Supreme Court of Missouri, rendered in the case of J. F. Williamson, respondent, *v.* Wabash Railroad Company, appellant, No. 39672, 196 S. W. 2d 129 (not officially reported), affirming a judgment in favor of respondent and against petitioner, in the sum of $17,500, rendered by the Circuit Court of Jackson County, Missouri, in an action brought under the Federal Employers' Liability Act as amended August 11, 1939, Title 45 U. S. C. A., Sec. 51 *et seq.*, 53 Statutes 1404. The judgment of the Supreme Court denies petitioner rights which it claimed and to which it was entitled under the Federal Employers' Liability Act.

The Supreme Court of Missouri is the highest court of Missouri in which a decision could be had (Constitution of Missouri, 1945, Article V, Sec. 2). "The Supreme Court shall be the highest court in the state." Article V, Sec. 7,

of the Constitution provides that the Supreme Court may sit *en banc* or in divisions.

On July 8, 1946, Division Two of the Supreme Court of Missouri (to which the case had been previously assigned (R. 168)) filed its opinion and affirmed the judgment of the Circuit Court of Jackson County, Missouri (R. 169).

On July 22, 1946, and within fifteen days, as provided by the rules of the Supreme Court, petitioner (appellant) filed in said Division Two its motion for rehearing or to transfer the cause to the Supreme Court of Missouri *en banc* (R. 178), which motion was overruled September 9, 1946 (R. 188), on which date the judgment became final and petitioner had exhausted its remedies in that court.

The above motion was duly filed, pursuant to the Constitution of Missouri, 1945, Article V, Sec. 9, which provides that a division may transfer a cause to the court *en banc*, and Rules 1.19 and 2.02 of the Supreme Court of Missouri, revised to January 18, 1945, which provide that motions for rehearing and to transfer to the court *en banc* must be filed within fifteen days after the opinion has been filed, and that the two motions may be joined and a rehearing or to transfer may be prayed in the alternative. (Appendix, p. 37).

III

Questions Presented

Under the evidence and the decisions of this Court, did the Supreme Court of Missouri deny petitioner its rights under the Federal Employers' Liability Act:

1. In refusing to determine that respondent had a positive and independent duty, which he violated, resulting in his injury, which violation barred his recovery, even though a superior employee at the same

time and place had the same duty, which he also violated.

2. In its interpretation of Wabash Rule 738, to the effect that respondent had not violated the rule.

3. In directing a verdict for respondent, where the question of proximate cause was an issue in the case,—

(a) With respect to whether or not petitioner's negligence was the proximate cause of respondent's injury.

(b) With respect to whether or not respondent violated a positive and independent duty, resulting in his injury.

(c) With respect to whether or not respondent was negligent in not seeing train No. 11 in time to have caused train No. 92 to stop prior to the collision.

4. In refusing to determine that respondent violated a duty, which entitled petitioner to its instruction "A", declaring respondent guilty of contributory negligence as a matter of law (R. 133).

5. In refusing to remand the case on account of the conduct of respondent's witness Dr. Casebolt.

IV

Reasons Relied On for the Issuance of the Writ

A

The Circumstances

Respondent, under Wabash Rule 738, was required to know (R. 84), and knew, the contents of the train order (R. 22-3), which provided that train No. 92 should stop and wait at Jameson for train No. 11, if No. 92 could not reach Gallatin by 2:10 A. M.; he knew, and stated that he knew

(R. 23), when his train reached Jameson at 2:05 A. M. (R. 23), that it could not reach Gallatin, 6.7 miles away, by 2:10 A. M.; he knew the engineer did not stop at Jameson; he knew a positive train order was violated; under Rule 738, he was required to know the duties of others and to act in emergency, in any capacity, to insure safety; an emergency existed which required action (two trains running in opposite directions on the same track); his duty under the circumstances was to take whatever action was necessary to stop the train. If he could not cause the engineer to stop the train, the means were at hand by which respondent could have stopped it (R. 64-5).

B

The Reasons

1. The opinion of the Supreme Court of Missouri does violence to the opinions of the courts in *Unadilla Valley Ry. Co.* v. *Caldine,* 278 U. S. 139, 73 L. Ed. 224; *Unadilla Valley Ry. Co.* v. *Dibble,* 31 F. 2d 239; *Davis* v. *Kennedy,* 266 U. S. 147, 69 L. Ed. 212; and other cases cited in our brief. These cases pronounce the "primary duty rule" and hold that where two employees, even though one be superior and one inferior to the other, have the same duty, which both violate, neither can recover.

2. The opinion of the Supreme Court of Missouri is in direct conflict with *Unadilla Valley Railway Company* v. *Dibble,* 31 F. 2d 239, decided by the United States Circuit Court of Appeals, Second Circuit. In that case, Dibble, the motorman, and Caldine, the conductor, *who was Dibble's superior,* both violated a "meet order," resulting in a collision. The court held Dibble could not recover, because his act was the primary cause of his injury. This important

question of Federal law should be settled by this Court for the benefit of the public, the courts, and the bar.

3. The dictum of this Court in *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54, 63, 87 L. Ed. 610, 615, has caused confusion in the application of the "Primary duty rule," where, in discussing assumption of risk under the Federal Employers' Liability Act, it said:

> "• • • Aside from the difficulty of distinguishing between contributory negligence and assumption of risk many other problems arose. One of these was the application of the 'primary duty rule' in which contributory negligence through violation of a company rule became assumption of risk. Unadilla Valley R. Co. *v.* Caldine, 378 U. S. 139, 73 L. Ed. 224; 49 S. Ct. 91; Davis *v.* Kennedy, 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 22. • • •"

We submit that the "primary duty rule" involves neither contributory negligence nor assumption of risk, and that if the above quotation is to be taken literally, the "primary duty rule" was abolished by the Federal Employers' Liability Act, as amended August 11, 1939.

4. Respondent violated a positive and independent duty, which was the sole cause of his injury, and the opinion of the Supreme Court of Missouri, in holding that petitioner was not entitled to a directed verdict, denied petitioner rights under the Federal Employers' Liability Act and decided this question of substance in a way not in accord with the applicable decisions of this Court, which are set forth in petitioner's brief.

5. The Supreme Court of Missouri in its opinion construed Wabash Rule 738 as meaning that it is *only* when a superior employee is incapacitated, due to sickness, death, or other reasons, that a lower employee is required to act in

emergency to insure safety. This construction reads into the rule something that is not there; there is nothing in the rule which justifies such a narrow construction of the word "emergency" and denies petitioner its rights under the Federal Employers' Liability Act.

6. The Supreme Court of Missouri misconstrued Wabash Rule 738 in holding that respondent had complied with the rule when he said to the engineer, "John, we can't make it," because respondent knew that they couldn't make it and yet he failed to say or do anything further.

7. The direction of a verdict for respondent, without submitting the question of proximate cause, denied petitioner its rights under the Federal Employers' Liability Act.

(a) Under the law and the evidence, the question of petitioner's negligence as the proximate cause of respondent's injuries should have been submitted to the jury.

(b) Under the circumstances above set out, the court should at least have submitted to the jury the question of whether or not respondent's negligence was the proximate cause of respondent's injuries.

(c) Respondent was the only man on the engine in a position to see train No. 11 coming from the opposite direction. He called out, "Headlight," when train No. 11 was 100 yards away, while the engineer of train No. 11, with equal opportunity to see, saw train No. 92 when it was 700 feet away. Train No. 92 had reduced its speed to 10 miles per hour at the time of the collision, and train No. 11 had practically stopped. Under these circumstances, the issue of whether or not respondent was guilty of negligence which was the proximate cause of his injuries should have been submitted to the jury. Instead, the court ignored these circumstances

and directed a verdict for respondent, saying that the issue of proximate cause was not in the case, thus denying petitioner rights to which it was entitled under the Federal Employers' Liability Act.

8. Respondent was guilty of negligence (at least contributory, if not primary) as a matter of law, and the opinion of the Supreme Court of Missouri in upholding the action of the trial court in refusing petitioner's instruction "A" (which was requested after petitioner's motion for a directed verdict was denied) denied petitioner the right to have a jury reduce the damages.

9. Dr. Casebolt, whose testimony as to the severity of respondent's injuries went further than that of any other doctor, denied at the trial (R. 48), that his specialty was gynecology, stated that his listing in the telephone directory under that specialty was a mistake and that he was not responsible for the mistake of the telephone company, and stated that the current telephone book was the first one in which he was so listed. On motion for new trial, it was established that Dr. Casebolt was responsible for the telephone listing, that the mistake in the listing was his mistake and not the mistake of the telephone company, and that most of his work was with surgical diseases of women, care and treatment of women, and obstetrics. Also, the telephone book current at the time of the trial was not the first telephone book in which he was listed as a gynecologist. This conduct of the doctor was prejudicial to petitioner's rights under the Federal Employers' Liability Act, and had a very material effect on the verdict of the jury.

Prayer

Wherefore, petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of Missouri, to the end that the judgment

of that court in the cause above mentioned may be reviewed and that upon such review, the decision of that court be reversed, and for such further relief as to this Honorable Court may seem proper.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 763

WABASH RAILROAD COMPANY, A CORPORATION,
Petitioner,

vs.

J. F. WILLIAMSON,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the Supreme Court of Missouri, in J. F. Williamson, respondent, *v.* Wabash Railroad Company, a corporation, appellant, is reported in 196 S. W. 2d 129 (not yet officially reported).

II

Statement as to Jurisdiction

The judgment of the Supreme Court of Missouri, the highest court of that state, determined rights claimed by petitioner under the Federal Employers' Liability Act as

amended August 11, 1939 (45 U. S. C. A. 51; 53 Stat. 1404), adversely to petitioner. Jurisdiction of this Court is urged under Section 237 of the Judicial Code as amended by an Act of February 13, 1925, Chap. 229, Sec. 1; 43 Stat. 937; U. S. C. A. Title 28, Sec. 344(a) and 344(b).

A more complete statement as to jurisdition and the nature of the case is made under Point II of the Petition for Writ of Certiorari, and will not be repeated here.

III

Statement of the Case

The statement in Point I of the Petition for Writ of Certiorari is adopted here for the sake of brevity.

IV

Specification of Errors

The Supreme Court of Missouri erred in the following particulars:

1. In holding that petitioner was not entitled to a directed verdict in its favor at the close of the evidence, where the evidence established that respondent violated a positive and independent duty to act in emergency to insure safety, which violation resulted in his injuries.

2. In construing Wabash Rule 738 as imposing a duty on respondent to act in emergency to insure safety *only* where a superior employee is *incapacitated* to perform his duties, due to sickness, death, or other reasons, because there is nothing in the rule that places such a narrow construction on the meaning of the word "emergency."

3. In holding that respondent complied with Wabash Rule 738 when he said, "John, we can't make it," because respondent neither said nor did anything thereafter until he saw the headlight of train No. 11, 100 yards away,

although he knew that the train order had been violated and that a collision was imminent.

4. In determining that the trial court properly directed a verdict for respondent without submitting to the jury the question of proximate cause:

(a) With respect to whether or not petitioner's negligence was the proximate cause of respondent's injury.

(b) With respect to whether or not respondent violated a positive and independent duty, resulting in his injury, which was the proximate cause of his injury.

(c) With respect to whether or not respondent's failure to see train No. 11 before it had reached a point 100 yards away was the proximate cause of his injury.

5. In refusing to give petitioner's instruction "A", which required the jury to find that respondent was guilty of negligence as a matter of law, because respondent knew that the train order had been violated, but failed to act in the emergency which existed, as required by Wabash Rule 738.

6. In refusing to order the case remanded because of the prejudicial conduct of Dr. Casebolt at the trial.

Summary of Argument

I

When train No. 92, on which respondent was head brakeman, passed Jameson, he knew that he was violating a train order. He had a positive and independent duty to act in emergency in any capacity to insure safety, under Wabash Rule 738, and his failure to act constituted negligence as a matter of law, which barred his right to recover. The

opinion of the Supreme Court of Missouri to the contrary is in conflict with the following cases:

Unadilla Valley Ry. Co. v. *Caldine,* 278 U. S. 139, 73 L. Ed. 224;

Unadilla Valley Ry. Co. v. *Dibble,* 31 F. 2d 239;

Davis v. *Kennedy,* 266 U. S. 147, 69 L. Ed. 212;

Frese v. *C. B. & Q. R. Co.,* 263 U. S. 1, 68 L. Ed. 131;

Great Northern Ry. Co. v. *Wiles,* 240 U. S. 444, 60 L. Ed. 732;

Van Derveer v. *Delaware L. & W. R. Co.,* 84 F. 2d 979;

Willis v. *Penn. R. Co.,* 122 F. 2d 248.

II

The dictum in *Tiller* v. *Atlantic Coast R. Co.,* 318 U. S. 54, 63, 87 L. Ed. 610, 615, to the effect that under the Federal Employers' Liability Act, contributory negligence, through violation of a company rule, became assumption of risk is misleading and confusing, is in conflict with decisions cited under point I above, and if taken literally, destroys the "primary duty rule."

III

Respondent was not entitled to a directed verdict. The issue of petitioner's negligence as the proximate cause of respondent's injuries should have been submitted, for the following reasons:

(a) Respondent knew that he was violating a train order when he passed Jameson, and yet failed to act in emergency to insure safety, as required by Wabash Rule 738. In view of those facts, the question of petitioner's negligence as the proximate cause of respondent's injuries should at least have been submitted to the jury.

(b) Respondent, with the same opportunity to see train No. 11 as the engineer of train No. 11 had to see train No. 92,

and with the duty on respondent to be on the lookout, did not see No. 11 until it was 300 feet away, while the engineer of No. 11 saw No. 92 when it was 700 feet away. No. 11 had practically stopped at the time of the collision, and the speed of No. 92 had been reduced from 30 miles per hour to 10 miles per hour. Because of these facts, the question of petitioner's negligence as the proximate cause of respondent's injuries should have been submitted to the jury.

(c) Under the Federal Employers' Liability Act, the carrier's negligence must be the proximate cause of the employee's injuries.

Lang v. *N. Y. Central R. Co.*, 255 U. S. 455, 65 L. Ed. 729;

St. Louis & S. F. R. Co. v. *Conarty*, 238 U. S. 243, 59 L. Ed. 1290;

Hylton v. *Southern Ry. Co.*, 87 F. 2d 393 (Cert. denied, 301 U. S. 609).

IV

Respondent was guilty of negligence (at least contributory) as a matter of law, and the court's failure to so instruct deprived petitioner of the right to have the jury reduce the damages, as provided by the Federal Employers' Liability Act.

(Authorities under Point I.)

V

Dr. Casebolt, whose testimony as to the severity of respondent's injuries went further than that of any other doctor, denied at the trial (R. 48) that his specialty was gynecology, stated that his listing in the telephone directory under that specialty was a mistake and that he was not responsible for the mistake of the telephone company, and stated that the current telephone book was the first one in

which he was so listed. On motion for new trial, it was established that Dr. Casebolt was responsible for the telephone listing, that the mistake in the listing was his mistake and not the mistake of the telephone company, and that most of his work was with surgical diseases of women, care and treatment of women, and obstetrics. Also, the telephone book current at the time of the trial was not the first telephone book in which he was listed as a gynecologist. This conduct of the doctor was prejudicial to petitioner's rights under the Federal Employers' Liability Act, and had a very material effect on the verdict of the jury.

ARGUMENT

I

The Supreme Court of Missouri in its interpretation of Wabash Rule 738 in effect destroyed the "Primary Duty Rule" and its opinion is in conflict with the opinions of this Court and of the United States Circuit Courts of Appeal.

Freight train No. 92 left Stanberry in charge of a crew of five men. Respondent, as head brakeman, was a member of that crew. Each member, under Rule 738, was required to know the contents of train orders, the duties of other members of the crew, and to act in case of emergency, in any capacity, to insure safety (R. 84). The duty of each was independent and primary. Respondent knew the contents of the train order, as was required of him (R. 22). That order provided that No. 92 should stop and wait at Jameson for train No. 11, if No. 92 could not reach Gallatin by 2:10 A. M. Respondent knew, and admitted that he knew, when his train reached Jameson at 2:05 A. M. (R. 23), that it could not reach Gallatin, 6.7 miles away, by 2:10 A. M.; he knew the engineer did not stop the train at Jameson; he knew a positive train order was violated; under Rule 738,

he was required to act in emergency, in any capacity, to insure safety; an emergency existed which required action (two trains running in opposite directions on the same track); his duty under the circumstances was to take whatever action was necessary to stop the train. If he could not cause the engineer to stop the train, the means were at hand by which respondent could have stopped it (R. 64-5).

Under these facts, the "primary duty rule" as announced in *Unadilla Valley Ry. Co.* v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224, and *Unadilla Valley Ry. Co.* v. *Dibble*, 31 F. 239, should have been applied. These cases involved the same accident. In the *Caldine* case, plaintiff's intestate was a conductor on a gasoline-driven suburban passenger car. Dibble, the motorman, was the only other member of the crew. As in the case at bar, it was the duty of both, as members of the crew, to know the contents of train orders. Both Caldine, the conductor, and Dibble, the motorman, permitted the car to leave the station in violation of an order which required them oo wait until another train had passed. In the ensuing collision with the opposing train, the conductor was killed. In reviewing the judgment obtained by plaintiff in the New York courts, in the *Caldine* case, this court held that Caldine was negligent and that, *although the motorman may have been negligent also*, yet the conductor, who knowingly violated such an order, could not recover.

In the *Dibble* case, the engineer, who was a lower employee than Caldine, the conductor, also brought suit against the railroad. Dibble was denied recovery, even though Caldine, the conductor, was negligent in violating the same order.

The theory of these cases is that, where two or more men have the same positive duty to perform, and both fail to perform it, one who knows of the other's failure cannot recover, even though the other may be his superior. The negligence

of the one does not contribute to the negligence of the other; each is directly responsible, and the law will not permit either to recover.

Davis v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212;
Frese v. *C. B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131.

Neither contributory negligence (*Van Derveer* v. *Delaware L. & W. R. Co.*, 84 F. 2d 979, l. c. 981), nor assumption of risk is involved (*Willis* v. *Penn. R. Co.*, 122 F. 2d 248, l. c. 249) in the application of the "primary duty rule."

In the case at bar, each member of the crew, at the time in question, had the positive duty not to pass Jameson. Respondent cannot excuse his failure to perform that duty by saying that another also failed.

The Supreme Court of Missouri, while recognizing the doctrine as announced in the above cases, destroyed the effect of those decisions by its interpretation of Wabash Rule 738. That rule is as follows: (R. 84-5)

> "Conductors, trainmen, yardmen, signalmen, operators and others whose duties are connected with the movement of trains, engines or cars, must familiarize themselves with the rules governing the duties of others as well as of themselves and must be prepared, in case of emergency, to act in any capacity to insure safety. The designation 'conductors' and 'trainmen' in any rule will also include yardmen, when applicable. While general regulations are subdivided for convenience they apply equally to all and must be observed wherever they relate in any way to the proper discharge of the duties of any employe. Trainmen, firemen and yardmen must remind their conductors or engine foremen, and enginemen of the contents of train orders, or the time of superior trains which must be cleared, should there be occasion to do so."

The Missouri Supreme Court held, first, that respondent had complied with Rule 738 when he said, "John, we

can't make it"; and, second, that under Rule 738, it is only when an employee is *incapacitated* to perform his duties, due to sickness, death, or other reason, that an emergency requiring action by a lower employee to insure safety arises.

Rule 738 is clear and unambiguous, and the construction of it by the Missouri court cannot be supported. The first sentence in the rule requires any employees "whose duties are connected with the movement of trains" to "familiarize themselves" with the duties of others engaged in the movement of trains and "be prepared, in case of emergency, to *act* in *any capacity* to insure safety."

Clearly this part of the rule calls, in case of *emergency*, for something more than merely *reminding* others of the contents of train orders or the time of superior trains, as is required in the last sentence of the rule. A great many occasions can and do arise in railroading where one employee should remind another of some order or schedule which, apparently, he may have overlooked, and by this portion of the rule, this lesser duty is confined to *train orders* and *schedules*. This is a duty to caution before an emergency arises. The first sentence in the rule applies as soon as the emergency *arises* and the clear literal intent and meaning of the rule requires one to *act* by performing *any* duty of one who for *any* reason is not performing his duty and has created an emergency.

When respondent said, "John, we can't make it," and the engineer replied, "I've got plenty of time," respondent knew, and admitted that he knew, that they couldn't make it. If under these circumstances it can be said that respondent complied with that portion of the rule which required respondent to call the engineer's attention to train orders, nevertheless, his positive duty under the rule did not end there. He knew it was the engineer's duty to stop the

train at Jameson, he knew that the engineer did not do so, and he knew that they could not make it to Gallatin by 2:10 A. M. Right then an emergency arose and it was respondent's positive duty to act in any capacity in insure safety. He admitted that he knew that the train order had been violated. The train was headed for a certain collision if he did not act. He didn't remonstrate; he didn't ask the engineer how much time he had. He did nothing, when he had a duty to act.

In its construction of Rule 738 in regard to what constitutes an emergency requiring action to insure safety, the Missouri court, in its opinion, said: (R. 171-2)

> "It is *obvious* that this rule (referring to Rule 738) means that if an employe is *incapacitated* to perform his duties due to sickness, death or other reasons, the next lower employe should step in and take over the *incapacitated* employe's duties." (Italics ours.)

There is nothing in the rule which requires that a superior must be *incapacitated* before there is an emergency which requires action by a lower employee. Why is it "obvious" that the rule means that? The purpose of the rule is, as it expressly states, to insure safety. To insure safety, each member of the crew must know the duties of the other members. For what purpose? So that he may act in the performance of those duties, in emergency, in any capacity, to insure safety. Why does it make any difference whether one or more of the members of the crew fail to perform their duties due to incapacity or negligence? It is to be prepared to meet an emergency that the rule requires knowledge of the duties of others and, when an emergency arises, requires action in any capacity to insure safety, no matter from what cause the emergency arose. With all due respect to the Missouri court, this construction of the rule seems to us to be the "obvious" one, and not

the construction placed on the rule by that court, which limits an "emergency" to one that has arisen solely from incapacity of some other employee. The court's construction reads into the rule something that is not there.

The duty to operate trains safely is on the company. The company must perform that duty through men. These men are human and one of them may make a mistake. That is why the duty is placed on each member of the crew to know the duties of others and be prepared to act in emergency in any capacity to insure safety.

Take the case of a truck stalled on the track in front of an oncoming train. The fireman is putting in a fire. The engineer is negligently looking the other way. The head brakeman, sitting where respondent was sitting in the case at bar, sees the truck stalled on the track and calls out, "Stop the train; there's a truck stalled on the track." The engineer says, "No, there isn't," and the brakeman knows that there is. Could it be said that there is no emergency requiring action under the rule? How much more of an emergency exists when one train is running on the time of another, and in the opposite direction! In the latter case, the lives of dozens are at stake. The greatest emergency in railroading exists. Action is required. If no action, a wreck; if action, safety.

The opinion of the Missouri court in its interpretation of Wabash Rule 738 has nullified the "primary duty rule", has denied petitioner its rights under the Federal Employers' Liability Act, and is in direct conflict with the *Unadilla* cases and other cases cited.

II

The Dictum of this Court in Tiller v. Atlantic Coast Line, 318 U. S. 54, 63, 87 L. Ed. 610, 615, in a case not involving the "Primary Duty Rule," to the effect that under the Federal Employers' Liability Act, contributory negligence through violation of a company rule became assumption of risk, is misleading and confusing and if taken literally, destroys the "Primary Duty Rule."

The opinion of this Court in *Tiller* v. *Atlantic Coast Line,* 318 U. S. 54, 63, 87 L. Ed. 610, 615, has caused confusion in the application of the "primary duty rule" when, in discussing assumption of risk under the Federal Employers' Liability Act, it said:

> "• • • Aside from the difficulty of distinguishing between contributory negligence and assumption of risk many other problems arose. One of these was the application of the 'primary duty rule' in which contributory negligence through violation of a company rule became assumption of risk. Unadilla Valley R. Co. *v.* Caldine, 278 U. S. 139, 73 L. Ed. 224, 49 S. Ct. 91; Davis *v.* Kennedy, 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 22. • • •"

The very foundation of the "primary duty rule" is that it does not involve contributory negligence or assumption of risk. The rule is that, where an employee has a positive duty to perform and fails to perform it, resulting in his injury, he cannot recover, even though other employees may have had the same duty, which they failed to perform. It is his negligence which bars his recovery. The negligence of others has nothing to do with the matter. Their negligence is not contributory, nor is there any question of assumption of risk. His negligence is the "sole cause" of his injury.

Unadilla Valley Ry. Co. v. *Caldine,* 278 U. S. 139, 73 L. Ed. 224;

Unadilla Valley Ry. Co. v. *Dibble,* 31 F. 2d 239;

Davis v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212;
Frese v. *C. B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131;
Van Derveer v. *Delaware L. & W. R. Co.*, 84 F. 2d 979, 981;
Willis v. *Penn. R. Co.*, 122 F. 2d 248, 249.

The above dictum in the *Tiller* case is confusing to the public, the bench, and the bar, and is not supported by the decisions of this Court given as authority for the statement.

We submit that the Court should take this case, clarify the Court's statement in the *Tiller* case, and settle the conflict which exists in the decisions of the courts in the application of the "primary duty rule."

III

The Supreme Court of Missouri erred in upholding respondent's instruction "1", directing a verdict for respondent, because the issue of proximate cause of petitioner's negligence should have been submitted to the jury.

The Supreme Court of Missouri held that the giving of respondent's instruction "1" was proper.

In so holding, the Missouri court (R. 173) said that under the Federal Employers' Liability Act, since petitioner admitted negligence of its conductor and engineer, this admission made appellant liable in damages for respondent's injuries, even though respondent may have been negligent, unless his negligence was the direct and primary cause of his injuries; that under the evidence and the court's interpretation of Wabash Rule 738, the respondent did not violate the rule; in effect saying that as a matter of law respondent's conduct did not constitute direct and primary negligence on his part which was the cause of his injuries.

Under the authorities cited under point I of our argument, if it was established beyond dispute (1) that plaintiff had the train order and understood it; (2) that he knew

when the train passed Jameson that he was violating a positive train order (he admitted that he knew they couldn't reach Gallatin by 2:10 A. M.); (3) that under Rule 738, plaintiff was required to act in an emergency; (4) that an emergency existed which required action; (5) that his duty under those circumstances was to take whatever action was necessary to stop the train; (6) that the means were at hand by which he could stop the train; and (7) that he didn't cause the train to stop; then, plaintiff's negligence barred his recovery. Our position under point I is that those facts were established beyond dispute and that, therefore, defendant's motion for a directed verdict should have been granted.

If, however, the Court does not agree with our position under point I, nevertheless, there is certainly evidence in the case of the above facts, and if they are true, they bar plaintiff's right to recover. That being so, a directed verdict should not have been given for the respondent. The question of petitioner's negligence as the proximate cause of respondent's injuries should have been submitted to the jury.

Under the Federal Employers' Liability Act, before an injured employee can recover, it is necessary that the carrier's negligence be the proximate cause of his injury.

Lang v. *N. Y. Central R. Co.*, 255 U. S. 455, 65 L. Ed. 729;

St. Louis & San F. R. Co. v. *Conarty*, 238 U. S. 243, 59 L. Ed. 1290;

Hylton v. *Southern Ry. Co.*, 87 F. (2d) 393 (Cert. denied, 301 U. S. 609).

Failure of Respondent to Keep a Vigilant Lookout as the Proximate Cause of His Injuries

There is one other question of proximate cause in the case, and that is—whether or not respondent's failure to see

train No. 11 until it was 100 yards away, when the engineer of No. 11, with equal opportunity to see, saw No. 92 when it was 700 feet away, was the proximate cause of his injuries. Respondent was on the fireman's side of the engine cab, with the duty to look ahead, and in this case that duty was more pronounced because he knew they were violating a train order. He failed to see No. 11 until it was 100 yards away. Even then, the speed of No. 92 was reduced to 10 miles an hour at the time of the collision. His duty was to look out. He was on the inside of the curve and was the only one on the engine of No. 92 who was in a position to see the approach of No. 11. The engineer of No. 11, who had equal opportunity to see across the curve, saw No. 92 when it was 700 feet away, immediately applied his air, and brought his train practically to a stop at the time of the collision. If respondent had seen No. 11 when it was 700 feet away, as he could and should have, since the engineer of No. 11, with equal opportunity to see, saw No. 92 that far away, instead of 300 feet, the question of whether or not the two trains would both have been stopped before the collision was a question for the jury. In view of this situation, at least the question of petitioner's negligence as the proximate cause of whatever injury respondent may have received, should have been submitted.

The Missouri court held that petitioner did not try the case on the theory that respondent failed to perform his lookout duty. In this we believe the court was in error, and that petitioner was deprived of its rights under the Federal Employers' Liability Act. The court overlooked the following:

1. The answer contained a general denial, which puts the question of proximate cause in issue (R. 6).

2. The answer also, under the plea of contributory negligence, pleaded that although plaintiff (respondent) "knew

or could have known the dangers of a collision, . . . he failed to cause the train on which he was riding to stop or slow down in time to avoid said collision; he failed to keep a reasonable and sufficient lookout; and jumped off the train before said collision occurred." While contributory negligence, in and of itself, would not bar recovery, this plea in the answer shows that petitioner was making the contention that the respondent failed to keep a lookout, failed to stop the train, and jumped off the train before the collision occurred.

3. Respondent testified that he was looking ahead, saw the headlight of No. 11, and called to the engineer, who immediately applied the air (R. 16).

4. On cross-examination of respondent, petitioner proved that it was the respondent's duty to look out and warn the engineer of any danger to the train (R. 24).

5. Petitioner proved, through engineer Meek, who testified that when respondent called "Headlight!", No. 11 was 100 yards away (R. 65).

6. Petitioner then proved by engineer Guitar that when he first saw No. 92, it was 700 feet away (R. 75).

7. Petitioner also proved that the speed of No. 92 was reduced from 30 miles an hour (R. 65) to 10 miles an hour at the time of the collision (R. 66) and that train No. 11 had practically stopped at the time of the collision (R. 75).

8. Petitioner objected to respondent's peremptory instruction because it didn't submit the issue of proximate cause to the jury.

The answer put the question of proximate cause in issue and the evidence and objections, as above set out, went directly to the issue of proximate cause. When respondent first saw No. 11 only 100 yards away, while the engi-

neer of No. 11, with the same view, saw No. 92 700 feet away, and where one of the trains had practically stopped and the other had reduced its speed to 10 miles an hour, it became a very material issue in the case as to whether or not, if the respondent had kept a proper lookout and had thus seen No. 11 when 700 feet away, the collision would have occurred.

IV

The opinion of the Supreme Court of Missouri in holding that respondent was not negligent as a matter of law denies petitioner its rights under the Federal Employers' Liability Act.

After petitioner's motion for a directed verdict was denied, petitioner asked that its instruction "A" be given, finding respondent guilty of contributory negligence as a matter of law. The Missouri court held that this instruction was properly refused, for the same reasons that it held that petitioner's motion for a directed verdict was properly denied, namely that respondent had complied with Wabash Rule 738.

What we have said with reference to the court's interpretation of this rule, under point I of the argument, applies equally here. Under both points, we contend that respondent was guilty of negligence as a matter of law. Under point I, we say that his negligence was primary and bars his right to recover. If the Court should disagree with us on that point, we say that at least his negligence was contributory as a matter of law.

Respondent, with the duty to keep a lookout (R. 62-3), was also guilty of negligence as a matter of law because he failed to see No. 11 until it was 100 yards away (R. 65), while the engineer of No. 11, with equal opportunity to see,

saw No. 92 when it was 700 feet away (R. 75). At the time of the collision, No. 11 had practically stopped (R. 75), having reduced its speed from 30 miles per hour (R. 77), from the time its engineer first saw No. 92. The speed of No. 92 had been reduced from 30 miles per hour, when No. 11 was 100 yards away, to 10 miles per hour at the time of the collision (R. 65-6). Respondent failed to see, when it was his duty to see. The evidence is uncontradicated that he could have seen No. 11 when it was 400 feet further away than when he did see it, because that is when the engineer of No. 11 saw No. 92.

Respondent was guilty of negligence as a matter of law, and it was error to refuse petitioner's instruction "A."

V

The Missouri Court erred in not sustaining defendant's motion for new trial on account of the mistake or perjury of respondent's doctor, M. B. Casebolt.

Respondent's witness Dr. Casebolt, on cross-examination, testified as follows: (R. 48)

"Q. You are not an orthopedic physican?

A. No, sir.

Q. Do you have a specialty?

A. My work is general surgery.

Q. Do you have any particular specialty, Doctor?

A. No, sir.

Q. Aren't you listed in the telephone book as a gynecologist?

A. Yes, sir; that got in there by mistake.

Q. That means a physician who specializes in the diseases of women?

A. Yes, sir.

Q. That means a child doctor, a doctor for childbirth?

A. Yes, sir.

Q. And venereal diseases?
A. Yes, sir.

• • • • • • •

(Redirect examination by Mr. Trusty.)

Q. You have been listed for years and years in your regular business as a general practitioner and surgeon?
A. Yes, sir.
Q. You are not responsible for the way the telephone company listed you?
A. No, sir.
Q. (Mr. Sebree) Is that the first telephone book in which you were so listed?
A. (The witness) Yes,sir."

As a matter of fact, the doctor's listing under the specialty "Gynecology-Obstetrics" in the telephone book was at his own instance, and was not a mistake of the telephone company; the December, 1944, telephone book, which was current at the time of the trial, was not the first book in which he was listed under that specialty; and most of his work for the last few years has been given to surgical diseases of women and to the care and treatment of women, and to obstetrics.

These facts were brought out in the depositions of William H. Bartleson, executive secretary of the Jackson County Medical Society (R. 147-8) and of Dewey H. Colton, directory sales supervisor of the Southwestern Bell Telephone Company (R. 152), taken by defendant in support of its motion for new trial, and attached to it; and by the affidavit of Sam B. Sebree (R. 162) and the counter-affidavit of Dr. Casebolt (R. 162).

On motion of respondent, the depositions were struck from the record by the court, but the court acted on the

Sebree affidavit, which incorporated the depositions by reference, and on the Casebolt affidavit.

Dr. Casebolt is not an orthopedic surgeon, and so far as the record shows, he did not examine the x-rays; nevertheless, his testimony as to the extent of respondent's injuries went further than that of any other witness. For that reason his credibility becomes most important. In his testimony at the trial, he stated that his specialty listing in the telephone book under gynecology got in there by mistake; that he could not help the way the telephone directory listed him; and that the current telephone book, December, 1944, was the first one in which he was so listed (R. 48-9). As a matter of fact, from the way the telephone company list was prepared, as shown by the Sebree affidavit on the motion for new trial, and which was not denied in the Casebolt affidavit, he was requested by the Jackson County Medical Society and the telephone company to state how he wished to be listed, and replied either by postal card or by telephone that he wished to be listed under the classification "Gynecology-Obstetrics." He was listed under that classification in the June, 1944, telephone book; in the December, 1944, book, which was current at the time of the trial; and he was also so listed in the June, 1945, telephone book, which came out on June 1, 1945, a few days after the trial.

His statements were not true, and since his testimony was the most damaging to petitioner on the respondent's injuries, his credibility is most material. His own affidavit (R. 163), which respondent filed in opposition to the motion for new trial, convicts him. In the affidavit, he says that the mistake to which he referred in his testimony was his own mistake in allowing himself to be listed as a gynecologist and yet, in his cross-examination at the trial, in response to the question by Mr. Trusty: "You are not responsible for the way the telephone company listed you?", he answered, "No, sir." Also in his affidavit he admitted that for the

last few years most of his work had been given to surgical diseases of women, to the care and treatment of women, and to obstetrics. In his affidavit, he attempts without success to avoid his statement that the current telephone book was the first in which his specialty was listed as "Gynecology-Obstetrics." The current book at the time of the trial was the December, 1944, book, which was replaced on June 1, 1945, by the June, 1945, book, but he had also been listed under the classification of "Gynecology-Obstetrics" in the June, 1944, book.

Five doctors gave evidence in the case. Dr. Handlor, who treated respondent at the hospital for his injuries (R. 31), Dr. Campbell (R. 95) and Dr. Casebolt (R. 42), for the respondent; and Dr. Stone (R. 104) and Dr. Schauffler (R. 117) for petitioner. Dr. Handlor, Dr. Stone and Dr. Schauffler all stated that in their opinion respondent was not permanently injured. Dr. Campbell testified that in his opinion, respondent had an injured vertebral disc between the fifth lumbar and the first sacral vertebrae, which in the majority of cases would be relieved by an operation. He did not testify to what extent respondent was incapacitated, nor did he testify that an operation would be dangerous. Dr. Casebolt found respondent's injury in the region of the fourth and fifth lumbar vertebrae, and stated that the injury was permanent and that an operation had one chance in three of success.

Dr. Casebolt was not fair to the jury, his conduct was prejudicial to petitioner's rights, and such a large verdict should not be permitted to stand on his testimony, as it denies petitioner its rights under the Federal Employers' Liability Act.

Conclusion

We urge the Court to grant this writ for the reasons above set out. The Missouri court has clearly misinter-

preted Wabash Rule 738, and in so doing has deprived petitioner of its rights under the Federal Employers' Liability Act.

Respectfully submitted,

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APPENDIX

Rules of the Supreme Court of Missouri

1.19—Motions for Rehearing. Motions for rehearing shall briefly and distinctly state the grounds upon which a rehearing is sought. They may be accompanied by suggestions in support containing citation of authorities. Such motion must be filed within fifteen days after the opinion of the court shall be filed, and the motion and suggestions must be served on the adverse party or his attorney within said time. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court.

The sole purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its opinion. Mere reargument of issues determined by the opinion will be disregarded.

If desired, suggestions in opposition to a motion for rehearing may be filed within ten days after the expiration of the time for filing of such motion, and a copy of such suggestions shall be served on the adverse party or his attorney within said time.

2.02—Transfer to the Court en Banc. A motion to transfer a cause under the provisions of the Constitution from either Division to the Court en Banc must be filed within fifteen days after the opinion of the court shall be delivered in Division and notice of the filing thereof must be served on the adverse party, or his attorney. A motion to transfer to the Court en Banc may be joined with a motion for rehearing and a rehearing or transfer may be prayed for in the alternative.